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No. 94-1925

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

SHORT HILLS ASSOCIATES, f.k.a.
Prutaub Joint Venture, *Petitioner,*

v.

NEW JERSEY COALITION AGAINST WAR IN THE MIDDLE EAST, SYLVIA ACKELSBERG, and DAVID CLINE, *et al., Respondents.*

On Petition for a Writ of Certiorari to the Supreme Court of New Jersey

PETITIONER'S REPLY BRIEF

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The respondents, understandably, now trivialize the decision of the Supreme Court of New Jersey in *New Jersey Coalition Against War in the Middle East v. J.M.B. Realty Corp.*, 138 N.J. 326, 650 A.2d 757 (1994) (4-3 decision), which, until their brief in opposition, they touted in the press as a monumental development. They do so by asserting that the opinion really applies only to "the 'open air' outside the mall itself," Br. in Opp'n at 2, and that it is indistinguishable from *PruneYard Shopping Center v. Robins,* 447 U.S. 74 (1980). *See id.* at 11. They are wrong on both counts.

Indeed, rather than address the substantial constitutional questions presented, the respondents instead suggest in their first "counter" question that there is no basis at all for review by this Court because the New Jersey court's decision "rested on adequate and independent state grounds." *Id.* at i. It is, however, irrelevant that the New Jersey court's ruling was based upon its

state constitution since the individual states may not, by their constitutions or by their laws, infringe a citizen's rights under the Constitution of the United States. Yet this is exactly what the New Jersey court has done. It has compelled the petitioner to create at its own expense a forum from which the respondents may preach their politics even in the face of the petitioner's undisputed opposition to those views.

This case, then, presents two issues. First, whether a state court order that requires a property owner to furnish a valuable portion of the owner's private property to political and social action groups to espouse causes opposed by the owner constitutes a forced subsidization of another's speech in violation of the First Amendment? Second, whether such a state court order that essentially grants to those groups an easement across private property, without using either the state's power of eminent domain or paying for the easement, violates the Takings Clause of the Fifth Amendment?

I. THE FIRST AMENDMENT PROHIBITS THE STATE FROM COMPELLING ONE CITIZEN TO SUBSIDIZE THE POLITICAL OR SOCIAL CAUSES OF ANOTHER BY CREATING A FORUM FOR THE OTHER'S LEAFLETING

The assertion in the respondents' second "counter" question, that the questions presented by the petitioner "were fully and properly adjudicated in *PruneYard*," Br. in Opp'n at i, is simply not true.[1] *PruneYard* did not address the question of whether the state court may force one private citizen to create on private property, and subsidize at his own expense with security, cleaning, electricity, heating, air conditioning, and upkeep, as well as with insurance, a forum for another's political speech where no such

[1] While the respondents assert that "this Court has consistently reaffirmed the *PruneYard* holding," Br. in Opp'n at 8 n.7, it would be more accurate to state that the Court has consistently *distinguished PruneYard*, sometimes on more tenuous grounds than at other times.

forum previously existed.[2] The *PruneYard* Court's reasoning quoted by the respondents was that a shopping center is " 'a business establishment [sic] open to the public to come and go as they please,' " *id.* at 10 (quoting *PruneYard*, 447 U.S. at 87), and the owner can (however effectively or ineffectively) "disavow any connection with messages." *Ibid.* But neither the ability of the public to come and go nor the alleviation of confusion addresses the question of compelled subsidization.[3]

The respondents try to deflect attention from the New Jersey court's forced subsidization of the Coalition's speech by asserting that the decision does not require The Mall at Short Hills to permit indoor access to political and social action groups. This misreading of the decision is disingenuous. The Coalition sought political access to the interior portions of the petitioner's shopping mall, *see* Compl. ¶18, and the state supreme court permitted the free speech sought by the respondents.[4] Moreover, even this exterior-interior distinction is not meaningful to the subsidy

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[2] Nor was the *PruneYard* Court presented with the factual record developed here through stipulations and 11 days of trial testimony, including the uncontested fact that the owner of The Mall at Short Hills disagrees with the message that the Coalition would force the owner to underwrite simply because the owner has successfully developed and successfully operates the property.

[3] Even if the questions raised in the petition dictate overruling *PruneYard*, the doctrine of *stare decisis* does not militate against such a result. As Justice Reed observed in *Smith v. Allwright*, 321 U.S. 649, 665 (1944):

> In constitutional questions, where correction depends upon amendment and not upon legislative action this Court throughout its history has freely exercised its power to reexamine the basis of its constitutional decisions. This has long been accepted practice, and this practice has continued to this day. This is particularly true when the decision believed erroneous is the application of a constitutional principle rather than an interpretation of the Constitution to extract the principle itself.

(Footnotes omitted.) Moreover, the very fact that this Court has consistently found itself distinguishing *PruneYard* rather than applying its doctrine, frequently by importing distinctions without any true difference, provides ample reason to overrule the opinion. *See Hubbard v. United States*, 115 S.Ct. 1754, 1765 (1995) (Scalia, J., concurring).

[4] The respondents' quotation in footnote 1 of their brief, Br. in Opp'n at 1 n.1, is a highly selective redaction of the text. Having granted the Coalition

question since virtually all of the expenses that are incurred by the mall owner and its tenants for the interior spaces are likewise incurred for the center's private sidewalks and parking lots. After all, the parking areas and entranceways are the areas of first impression to customers, and they must be cleaned, lighted, maintained, secured, and insured. If the organizers of 20,000 marchers parading on the *public streets* of South Boston and drawing one million watchers cannot be required to include a group imparting an unwanted message, *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston,* 63 U.S.L.W. 4625 (U.S. June 19, 1995) (No. 94-749), what possible constitutional justification is there to force private citizens on their own private property to provide a forum for, and subsidize, unwanted messages?[5]

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access to the defendant-shopping malls, the New Jersey court, in discussing the permissible scope of time, place, and manner regulations, said:

> Limits on the place of exercise of the right may *perhaps* properly confine the exercise of free speech rights to the parking lot, or to common sidewalks and other areas outside the enclosed malls. We do not at all, however, exclude the possibility that the leafletting, to be effective, may require access to the enclosed portion of the center.

New Jersey Coalition, 133 N.J. at 378, 650 A.2d at 783 (emphasis added). This is the only reference in the opinion to the exterior of the malls, which the respondents now claim for the first time limits the holding. Clearly what the court was suggesting was that, on balance, the owners' property interests, and thus their power to impose regulations concerning the exercise of speech on their property, was broader in the interior, versus the exterior, of their enclosed malls.

[5] The respondents argue that the petitioner has no First Amendment right because it is not engaged in any expressive activity. Br. in Opp'n at 6. Yet even the New Jersey court conceded that the operation of the defendant-shopping malls included expressive uses and "some element of speech." *New Jersey Coalition*, 138 N.J. at 358, 650 A.2d at 773. Although not vocal, the owner of The Mall at Short Hills is engaged in deliberate expressive activity that defines the mall to its customers, both by its presentation through selection of tenants, architecture, and advertising, and by excluding all expression that is "controversial in nature or confrontational." *New Jersey Coalition Against War in the Middle East v. J.M.B. Realty Corp.*, 266 N.J. Super. 195, 203, 628 A.2d 1094, 1099 (Ch. Div. 1991). Indeed, the petitioner's decision to exclude all political expression from the property - and the immediately evident apolitical ambiance

II. THERE IS NO INVITATION TO LEAFLET, AND THE FIFTH AMENDMENT PROHIBITS THE STATE FROM GRANTING AN EASEMENT FOR POLITICAL LEAFLETING ON PRIVATE PROPERTY WITHOUT JUST COMPENSATION TO THE OWNER

The "implied invitation to leaflet" that is the basis of the court's holding, *see New Jersey Coalition,* 138 N.J. at 357, 372, 650 A.2d at 772, 780, is purely a fiction. The Mall at Short Hills has an *express*, publicly-known policy prohibiting leafleting and other political expression. The mall has never allowed political functions in its common areas, nor does it permit charitable groups to solicit there. App. to Pet. for Cert. 144a ¶¶18, 19. The Coalition knew in advance and understood that it was not welcome at the mall to petition, and it so alleged in its state-court complaint. *See* Compl. ¶18. The only invitation that the Coalition received was from the New Jersey court! It is difficult to comprehend how the state court's "finding" of an implied invitation could overcome the petitioner's *express* policy and be used to "take" the petitioner's own constitutional right to control the activity permitted on its private property, especially when the activity is the expression of political views that the petitioner opposes.

The respondents attempt to bolster the court's "finding" of an invitation by highlighting the "public events and public amenities" in The Mall at Short Hills: a fitness walk program, a New Jersey Transit bus shelter, and the hiring of off-duty police officers for mall security. Br. in Opp'n at 4. These are the only "public events" that the respondents can find in The Mall at Short Hills! Never mind that the fitness walk program is conducted *before* daily business hours, Resp'ts' App. 5a ¶15, as a marketing tool to get customers to come to the mall and stay during the "slow" opening hours of business and shop; the New

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of the petitioner's mall - is itself expressive activity that projects a more pointed message than any which the parade organizers might have wished to express. The autonomy of a citizen to remain silent on subjects he "would rather avoid" is a fundamental rule of protection under the First Amendment. *Hurley,* 63 U.S.L.W. at 4630.

Jersey Transit bus shelter is located "at the *outside perimeter* of the parking lot surrounding the mall," *id.* 3a ¶8 (emphasis added), and it was put up at the demand of the transit authority, not at the invitation of the mall owner; and the off-duty officers are *hired* at great expense by the mall during the peak holiday season to provide additional security.[6]

The respondents, as well as the New Jersey court, completely ignore the testimony of the Coalition's own political expert that the municipalities surrounding the shopping centers provide more and better opportunities for leafleting than ever before (not even considering the enhanced opportunities presented by cable television and computer technology). Nor do they or the court even mention that the Coalition had successfully conducted public hearings in Jersey City, teach-ins and public forums at churches and universities, gatherings at state congressional offices, a rally at McGuire Air Force Base, and vigils at local hospitals, among other activities. Indeed, without access to shopping malls, the Coalition handed out over 85,000 leaflets during the two weeks preceding the hearing on its motion for a temporary restraining order. No showing was made, or could have been made, that the Coalition had no "adequate alternative avenues of communication." *Lloyd Corp. v. Tanner,* 407 U.S. 551, 567 (1972).[7]

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[6] The respondents never pressed a claim that the mall's conduct had the character of state action. It is mystifying, then, why public bus service and the occasional presence of off-duty municipal police officers should have any relevance to the questions presented by this case.

[7] The respondents' further argument that The Mall at Short Hills introduced no evidence indicating loss of revenue at California shopping malls, Br. in Opp'n at 3, is hypocritical. The respondents *objected* to The Mall at Short Hills' proffer of that very evidence with respect to a Connecticut shopping mall; the objection was on the ground that the evidence was not relevant to the circumstances in New Jersey. The trial judge sustained the objection and ruled that no out-of-state evidence - Connecticut or California - would be admitted. In fact, however, the market survey evidence in the record - again, completely ignored by the state supreme court - certainly shows that business would be lost as a result of political and social action leafleting. *See* App. to Pet. for Cert. 146a-169a.

The respondents also argue that the state supreme court "reasonably and accurately balanced the rights of the owners of the regional shopping malls against the need of the public for access to places to disseminate ideas." Br. in Opp'n at 13. The court did no such thing. Rather, the court eschewed the facts in the record, depending instead on its "belief" that "the right of freedom of speech" is "fundamentally more important" than private property rights, and that "the correct resolution of the conflict between those rights is self-evident." *New Jersey Coalition*, 138 N.J. at 371, 650 A.2d at 780.

Even if somehow there were an implied invitation, under hornbook principles of property and contract law, the owner of private property may revoke his invitation and limit access to a particular purpose. Indeed, even "[w]ith respect to *public* property that is not a designated public forum open for indiscriminate public use for communicative purposes . . . '[c]ontrol over access . . . can be based on subject matter and speaker identity so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral.' " *Lamb's Chapel v. Center Moriches Union Free School Dist.*, 113 S.Ct. 2141, 2147 (1993) (quoting *Cornelius v. NAACP Legal Defense and Ed. Fund, Inc.*, 473 U.S. 788, 806 (1985)) (emphasis added). Yet this is not so after *New Jersey Coalition*. The Mall at Short Hills is now essentially public property (because it "closely resembles public property," *New Jersey Coalition*, 138 N.J. at 333, 757 A.2d at 761) with the "correspondingly broad" invitation to use the property dictated by the state. *Ibid.* The owner may not limit access by posting signs at the door that the invitation extended is only to shop, nor, presumably, may the owner limit political access by charging an admission fee. Under *New Jersey Coalition*, the state has granted a permanent and irrevocable easement of access to political and social groups to occupy what was once private property. Equally pernicious, the state has imposed on the property owner the governmental duty of regulating the so-called free speech rights of others, as well as the obligation of preserving those so-called rights by providing security and insurance. These are obligations of the state, not individual citizens, and the state court may not, by judicial decree,

impose governmental burdens on a select few or take their property for public use without just compensation. For governmental action as intrusive as that of the Supreme Court of New Jersey, close judicial review under the Constitution of the United States is essential.

Conclusion

For these reasons, as well as those urged in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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